87-88

Case No. _____

UNITED STATES SUPREME COURT

October Term, 1986

PATRICIA MABRY,

Petitioner,

v.

STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. May discrimination based on head of household status be forbidden by administrative regulation issued under the auspices of the prohibition on sex discrimination contained in Title IX of the Education Amendments of 1972?

2. Did petitioner work in a "educational program or activity" receiving federal funds within the meaning of Title IX?[1]

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[1] In addition to the parties listed in the caption, Gordon Dickinson, Ross Forney, Angelo Daurio, Dr. Elinor Greenberg, Thomas Grimshaw, Raymond Guerrie, Isaiah Kelley, Jr., Fred Valdez, Sr., Raymond Wilder, and Thomas Sullivan were named defendants.

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IN THE

SUPREME COURT OF THE UNITED STATES

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Patricia Mabry petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Decisions Below

The Tenth Circuit's opinion is reported at 813 F.2d 311, 43 Fair Empl. Prac. Cas. (BNA) 259 and 42 Empl. Prac.

Dec. (CCH) ¶36,864 and is reproduced at Appendix (App), pp. 2-29. The district court's decision following trial is not reported, but is reproduced at App. 32-42. The district court's decision on summary judgment is reported at 597 F. Supp. 1235, 36 Fair Empl. Prac. Cas. (BNA) 526 and 38 Empl. Prac. Dec. (CCH) ¶35,593 and is reproduced at App. 43-61.

Jurisdiction

The Tenth Circuit's judgment was entered March 8, 1987. Petitioner's timely request for rehearing was denied April 14, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations

20 U.S.C. § 1681(a):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance ...

34 C.F.R. § 106.57 (1986):

(a) General. A recipient shall not apply any policy or take any employment action:

* * *

(2) Which is based on whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

Statement of the Case

Patricia Mabry was the most junior and only female member of the physical education faculty at Trinidad State Junior College ("College") in Trinidad, Colorado. App. 4. In addition to physical education Mabry taught speech and first aid. App. 4, 66-68. The speech and first aid courses taught by Mabry were required for degrees in criminal justice, nursing and soil

conservation. App. 4. The criminal justice, nursing and soil conservation programs of the College (among others) received direct federal funding. App. 67, 77-78. Students pursuing degrees in these programs were also required to obtain three hours of physical education credit. App. 67.

In 1980, the College administration determined to reduce the number physical education faculty. By state statute[2] individuals of "relatively equal" competency were to be reduced in reverse order of seniority. The College made no evaluation of the competency of physical education instructors and notifed Mabry that she would be terminated. Due to the lack of evaluation a state administrative

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2 § 23-10-203(4), 9 Colo. Rev. Stat. (1986 Cum. Supp.).

hearing officer and board reversed the College's action. App. 75-76.

In 1981, College President Thomas Sullivan performed a perfunctory evaluation of the physical education faculty, found them "relatively equal" and again sought to terminate Mabry. Mabry again challenged the termination, arguing primarily that her extensive graduate level studies and professional activities made her relatively more competent than her more senior male colleagues.

In defending his determination that all physical education faculty were "relatively equal," Sullivan testified that he had not considered Mabry's more extensive academic preparation and activities to make her more qualified in part because her male colleagues were

married and had children, while Mabry was single. E.g., App. 4-5, 69-75. Mabry exhausted the administrative procedures for termination of college faculty under state statute as well as the Equal Opportunity Employment Commission procedures for Title VII charges. This litigation followed.[3]

Mabry's complaint claimed violation of Title VII and Title IX[4] and she argued, first, that Sullivan's admission of explicit consideration of the marital and parental status of Mabry and the male faculty was evidence of intentional

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[3] The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 2000e-5f.

[4] Mabry plead that termination "on the basis of her parental or marital status ... violated 20 U.S.C. § 1681 and its implementing regulations." Complaint ¶ 17. She also claimed such violation gave rise to an action under 42 U.S.C. § 1983. Id at ¶ 18.

sex-based discrimination and, second, that disadvantaging a single woman because her male colleagues were married heads of households per se violated 34 C.F.R. § 106.57(a)(2) and, therefore, Title IX.

The district court granted partial summary judgment dismissing the Title IX claims, holding that Mabry did not work in a "education program or activity" receiving federal funds. App. 53-59. Following trial, the district court dismissed the Title VII "disparate treatment" claim, crediting Sullivan's statement that his evaluation of faculty competence was not tainted by intentional consideration of "sex." App. 32-42. The district court's decision following trial made no mention of Sullivan's admitted, and undisputed, consideration of marital

and parental status in determining faculty competencies. Final judgment entered on the court's ruling following trial, and Mabry appealed.

On appeal Mabry challenged the determination that she had not worked in a program or activity receiving federal funds and argued that a prima facie violation of 34 C.F.R. § 106.57(a)(2) had been shown. The defendants joined these issues and additionally argued that: (1) the availability of a Title VII remedy preempted the private cause of action under Title IX, and (2) the district court's adverse determination of the Title VII disparate treatment claim "estopped" any claim under Title IX.

The Tenth Circuit ruled that: (1) an administrative regulation forbidding discrimination based on marital or

parental status would be invalid as reaching beyond the Congressional prohibition on sex discrimination; (2) the prohibition on sex discrimination in Title IX was "no broader" than the prohibition in Title VII; and (3) Mabry's decision to argue only the Title IX issues on appeal constituted a "failure to appeal" the adverse Title VII ruling, which then operated by res judicata or collateral estoppel to preclude further consideration of the Title IX claim. App. 1-31.

Reasons for Granting a Writ

I. 34 C.F.R. § 106.57(a)(2) is Valid.

34 C.F.R. § 106.57(a)(2) squarely prohibits employment discrimination based on head of household status. The Tenth Circuit admitted that this subsection "would appear" to prohibit such

discrimination, but found such a prohibition "would extend beyond the prohibitions of Title IX." "The regulation at issue cannot, therefore, prohibit" discrimination based on head of household status.[5]

The language of 34 C.F.R. § 106.57(a)(2), has its origins in the original promulgation of implementing regulations under Title IX. 40 Fed. Reg. 2418 (June 4, 1975). It has carried over in the various recodifications of these regulations, issued by several federal agencies, to the present. E.g., 45 C.F.R. § 86.57(a)(2). The Tenth Circuit's rather casual invalidation of

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[5] The Tenth Circuit refers to the prohibition on head of household discrimination as an "interpretation" of 34 C.F.R. § 106.57(a)(2). But there is no "interpretation" involved; the rule says precisely what Mabry has claimed it said all along.

this long-standing regulation is erroneous, and presents an important issue in employment discrimination law.

The deference due to regulations implementing a statute is clear:

> If ... Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. ... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> * * *
>
> ... [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron U.S.A. v. N.R.D.C., 467 U.S. 837, 843-844 (1984) (citations and footnotes omitted).

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." ... "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion ...'"

Udall v. Tallman, 380 U.S. 1, 16 (1965) (citations omitted). See also Lukhard v. Reed, ___ U.S. ___, 55 L.W. 4561, 4563 n. 3 (April 22, 1987).

Thus, the question here is whether prohibiting discrimination based on head of household status is a "reasonable" interpretation of the prohibition on

"sex" discrimination in Title IX. The Tenth Circuit got off on the wrong foot in answering this question in part because of its apparent determination that there not be "two separate substantive standards concerning sex discrimination in employment." App. 27. Yet the possibility that two standards will exist is inherent when one statute (Title VII) calls for interpretation "in the first instance in judicial proceedings," while another (Title IX) requires judicial deference to any reasonable administrative interpretation.

More importantly, the regulation is manifestly reasonable. One need not reach beyond the first decision of this Court concerning sex discrimination in employment to demonstrate that head of

household categorizations generally reflect sex-stereotyping:

> The [plaintiff] ... assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.
>
> It certainly cannot be affirmed, as an historical fact, that this has ever been established ... On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. ... The constitution of the family organization ... indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. ...
>
> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married

> state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Bradwell v. State, 83 U.S. (16 Wall.) 130, 140-141 (1872) (Opinion of Justice Bradley).

The implications of thinking like Justice Bradley's are easily worked out and obviously discriminate on the basis of "sex." Men are responsible as 'bread winners' for their families and therefore should be preferred for employment over women. Nevertheless, a single mother is suspect as an employee since her "paramount" interest will no doubt remain that of "mother." Unmarried women with no children, like petitioner, are mere "exceptions to the general rule."

That such reasoning was the very evil perceived by Congress as in need of

remedy seems beyond doubt. First, it is surely no coincidence that Title IX focuses on education. Congress perceived that women needed "solid legal protection as they seek education and training for later careers ..." 118 Cong. Rec. 5806-5807 (1972) (Remarks of Senator Bayh) (emphasis added). The stereotyping that suggests women are less fit for professional careers a fortiori suggests they do not need training for such careers. Further, the sterotyping of women as first and foremost homemakers was one of the express concerns leading to the passage of Title IX. The "genesis" of Title IX, of course, was in hearings conducted by Representative Edith Green of Oregon in 1970. See Cannon v. Univ. of Chicago, 441 U.S. 677, 694 n. 16 (1979). The committee chaired

by Representative Green received statistical studies showing that increasing numbers of both married women and women heads of households were entering the labor force, but that women heads of household, in particular, were still comparatively poor. E.g., Stimpson, ed., Discrimination Against Women (1973), pp. 343-45, 351-360 (excerpts from testimony before Representative Green's committee). Commentators before the committee complained that male educators discriminated against female professionals in part because they did not "distinguish between these women and their own homemaker wives." Id at 457. Citation to such studies and concerns as expressed to Congress could be multiplied, but the point seems too

obvious to need repetitious citation: A stultified view of the role of women in the home and as parents is a root cause of discrimination against women in the workplace. Surely it is rational for the an administrative agency, by rulemaking, to directly attack this cause of sex discrimination.

While a court will typically accept or reject the argument that head of household discrimination <u>is</u> sex discrimination on a case by case basis, an administrative agency is free make this determination, reasonably, "as a general rule." Just as legislation is typically based on generalities rather than painstaking individuation so, reasonably, may administrative rules move from a general correlation to an across-the-board prohibition. 34 C.F.R.

§ 106.57(a)(2) is just such a rule, and was improperly invalidated by the Tenth Circuit.

Because the Tenth Circuit erred in invalidating this regulation, the Title VII determination has no necessary effect on Mabry's Title IX claim.[6]

II. Mabry Taught in Programs Receiving Federal Funds

Generally, this Court reviews decisions of the federal Courts of

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[6] Mabry appealed a judgment, not isolated issues. Thus, the Tenth Circuit's use of the language of preclusion by judgment was misplaced; a judgment under appeal does not estop itself. However this error, while egregious, is irrelevant. We could have argued that the admission of head of household discrimination made the finding of no "sex" discrimination under Title VII or Title IX "clearly erroneous." E.g., Coble v. Hot Springs School Dist., 682 F.2d 721 (8th Cir. 1982). We did not. Here, as in the Tenth Circuit we are content to argue only that 34 C.F.R. § 106.57(a)(2) was applicable, valid and violated.

Appeals and the Tenth Circuit did not reach this issue. The facts involved here are simple enough, the law from this Court clear enough and the district court's error serious enough to justify review of this point, nonetheless.

The district court found that Mabry's primary assignment, in physical education, did not directly receive federal funds and, therefore, Title IX did not apply. This approach, while paying lip service to Grove City College v. Bell, 465 U.S. 555 (1984), ignores that Mabry's activities received some direct support from federal funding and her position, taken as a whole, as well as her department, received "indirect" support. See O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986) (criticizing Mabry and other decisions as

focusing on "the very smallest subunits" of an institution in a way that "retain[s] the direct/indirect distinction expressly rejected" in Grove City).

Courses taught by Ms. Mabry were required for students pursuing degree programs that received direct federal funding. Thus, the physical education department benefited from an instructor who was partially employed in directly federally-supported non-physical education programs. Further, the physical education program benefited from having its courses generally required for those pursuing federally supported degree programs. Ironically, the College determined which degree programs to offer, which courses would be required

and which Ms. Mabry would teach, not to mention which federal funds to apply for.

Put another way, a student who enrolls in federally assisted programs does so not just to take courses in the area federally funded, but to obtain an education and a degree. Similarly, Congress provides support not for specific courses, but for programs that provide an education in a given discipline. The recipient college then determines what courses are required for it to certify the proper level of general education and proficiency in a specific discipline. The college also determines which departments and faculty will deliver the required courses. Departments and faculty thus benefit from federal funding (directly or indirectly) based on the college's own determination

of degree requirements. Simply, the College here determined that federally funded programs required Ms. Mabry's services in teaching P.E. and other courses. Her position, plainly, was covered by Title IX.

It may well be most sensible to simply determine that the College's academic programs as a whole "received" federal funds. This Court's decision in Grove City seems to contemplate such a result when it finds the entire financial aid program of that college "received" federal funds. See O'Connor v. Peru State College, supra. But in any event, student enrollment in directly funded programs which in turn inure to the benefit of particular academic departments and academic faculty by virtue of degree requirements should

unquestionably bring those departments and faculty within the ambit of Title IX. Mabry was plainly covered by Title IX, and thus by 34 C.F.R. § 106.57(a)(2).

III. These Issues Are Important

We are well aware that error, alone, does not justify resort to this Court. The issues here are important, however, for several reasons. First, this Court's decision in Grove City is widely misperceived (as in this case by the district court) as dramatically restricting the scope of Title IX. An exclusive focus on the "program specificity" of Title IX and like statutes unduly restricts the reach of "indirect" federal funding. This, in turn, frustrates the underlying purpose of "avoid[ing] the use of federal resouces to support discriminatory

practices." Cannon v. Univ. of Chicago, supra, 441 U.S. at 704. The area of academic life in which Title IX has perhaps brought and still promises the greatest progress -- physical education and athletics -- is perhaps the area most vulnerable to the misconstruction illustrated by this case.

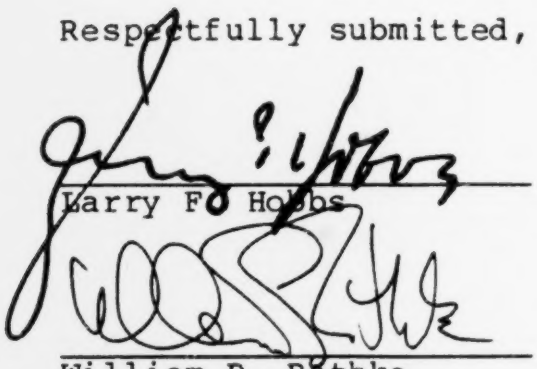
The relationship of head of household discrimination to sex discrimination is similarly important. The initial scope of Title IX, like Title VII, was broad and its remedial purposes expansive. The problem of discrimination against women heads of household, because they were heads of household, was an express concern before Congress. The sex stereotyping that treated male professionalism as natural and female professionalism as freakish was an evil

attacked by this statute. We do not suggest the courts are at fault in giving too parsimonious a reach to Title VII. We do suggest that a legitimate effort by an administrative agency to address the root causes of invidious discrimination has been here far too readily set aside.

Conclusion

For these reasons certiorari should be granted.

Respectfully submitted,



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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PATRICIA MABRY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 85-1710
	)	
THE STATE BOARD OF COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLEY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board for Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the State of Colorado
(D.C. No. 83-K-852)

Larry F. Hobbs (Vonda G. Hall with him on the briefs) of Hobbs/Bethke & Associates, Denver, Colorado, for Plaintiff-Appellant.

Daniel R. Satriana, Jr., Hall & Evans (Bruce M. Pech, Assistant Attorney General, with him on the briefs) of Denver, Colorado, for Defendants-Appellees.

Before McKAY and ANDERSON, Circuit Judges, and JOHNSON, District Judge.*

ANDERSON, Circuit Judge.

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* The Honorable Alan B. Johnson, District Judge, of the United States District Court for the District of Wyoming, sitting by designation.

Plaintiff, Patricia Mabry, appeals from an order of the United States District Court for the District of

Colorado granting defendants'[1] motion for partial summary judgment and dismissing her claim alleging that her termination of employment constituted sex discrimination in violation of Title IX, 20 U.S.C. §§ 1681-1686 (1982). We affirm.

BACKGROUND

The district court found and the record reveals the following relevant

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[1] The initial defendants were the State Board of Community Colleges and Occupational Education, the individual members of the State Board, and Thomas Sullivan, President of Trinidad State Junior College. The State Board is a corporate body "responsible for the administration of public post-secondary education at certain institutions in the State of Colorado, including Trinidad." R. Vol. I at 28. As we discuss infra, the individual members of the State Board were dismissed and Mabry has not appealed that dismissal. Accordingly, references to defendants in this opinion are to the State Board and Sullivan. However, our analysis in this opinion would apply equally to the other defendants, were they before us.

facts. Mabry was employed as an instructor and a coach in the physical education department at Trinidad State Junior College ("Trinidad") in Trinidad, Colorado from the 1974-75 through 1981-82 academic years. She also taught courses in speech and first aid. R. Vol. I at 116.

In December 1981, Mabry received notice from defendant Thomas Sullivan ("Sullivan"), the President of Trinidad, that she was being terminated because of a "reduction in force" resulting from a decrease in student enrollment at the college. The remaining two members of the physical education department, both male and with greater seniority than Mabry, were retained. At his deposition, Sullivan stated that a factor in his decision to terminate Mabry was that her

two male colleagues were married and had children. R. Vol. II at 93-94.

After she received her notice of termination, Mabry requested and received a hearing before Trinidad's Campus Hearing Committee. Mabry exhausted the hearing procedures at Trinidad and all administrative remedies available to her. After receiving a notice of right to sue from the Equal Employment Opportunity Commission, she commenced an action in the district court in Colorado. Mabry alleged that her employment was terminated on the basis of her sex and/or her parental or marital status, in violation of the provisions of Title VII, 42 U.S.C. § 2000e to § 2000e-17 (1982). Title IX, 20 U.S.C. §§ 1681-1686 (1982) and its implementing regulations, and section 1983, 42 U.S.C. § 1983

(1982).[2] She also alleged that she was subjected to sex-based discrimination because of the nature and quality of the facilities at Trinidad. She sought damages, reinstatement with back pay and benefits, and attorneys' fees and costs pursuant to 42 U.S.C. §§ 1988 and 2000e-5(k) (1982).

In response to defendants' motion for partial summary judgment, the district court dismissed Mabry's Title IX and section 1983 claims on the grounds that the instructional program areas in which Mabry taught were not education

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[2] In her complaint, Mabry specifically alleged that defendants violated Title VII by terminating her on the basis of her sex, that they violated Title IX and its implementing regulations by terminating her on the basis of her parental or marital status and/or her sex, and that they violated section 1983 by violating Title IX and its implementing regulations. Complaint para. 16-18; R. Vol. I at 2-3.

programs or activities which receive federal financial assistance within the meaning of Title IX,[3] and that the availability of complete remedial devices under Title IX precluded her remedy under section 1983. The district court also dismissed the individual State Board members on the ground that they were protected by a qualified immunity.

Mabry's Title VII claim was tried to the district court on April 2 and 3, 1985. The district court entered judgment on April 16, 1985, for defendants, finding

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[3] 20 U.S.C. § 1681(a) provides, in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

that Mabry's termination was in accordance with the State Board's policy and the relevant Colorado statutes and "without consideration of the sex of the three physical education instructors involved. . . ." R. Vol. I at 159; Findings of Fact No. 12. The court further concluded that "[i]llicit consideration of plaintiff's sexual identity did not occur and the reasons stated for her termination were not pretextual." Id. at 160; Conclusions of Law No. 4. Implicit in that conclusion is the finding that defendants' consideration of Mabry's marital and parental status did not amount, in this case, to sex discrimination. Mabry has limited her appeal in this court to "whether the district court erred in dismissing the plaintiff's Title IX (20

U.S.C. §1681) claim on defendant's motion for summary judgment." Plaintiff-Appellant's Opening Brief at 3.

DISCUSSION

In this appeal, Mabry argues that the district court erred in dismissing her Title IX claim because she participated in a program that received federal financial assistance within the meaning of Title IX. She also argues that the cause of action she asserts under Title IX is not actionable under Title VII because "the courts have held that Title VII rather than proscribing distinctions based on marital status, as in the instant case, proscribe [sic] sex discrimination resulting from a situation where an employer has applied a different requirement regarding marital status to females than to males."

Plaintiff-Appellant's Reply Brief at 9-10 (emphasis original).[4] We do not reach the question of whether Mabry participated in a Title IX "program," however, because her claim is actionable under Title VII, and the district court's judgment of April 16, 1985, from which Mabry took no appeal, constitutes a final determination of an essential element of her Title IX claim.

I.

APPLICATION OF TITLE VII

Mabry argues that her claim of discrimination based on "marital, parental head of household and wage

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[4] Another issue raised in this appeal was whether the existence of a full and complete remedy for Mabry under Title VII preempts her Title IX claim. Because the final determination with respect to Title VII precludes retrying the same issues in Mabry's Title IX claim, we do not reach the preemption issue.

earner status," Plaintiff-Appellant's Reply Brief at 11, is not cognizable under Title VII, but is under Title IX by virtue of 34 C.F.R. § 106.57 (1986), one of Title IX's implementing regulations. She argues that an EEOC guideline regarding distinctions based on marital status shows that "Title VII does not recognize policies concerning the marital, parental or wage earner status of individuals except where such discrimination varies with the sex of the individual."

Plaintiff-Appellant's Reply Brief at 9.[5]

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[5] This guideline is promulgated in 29 C.F.R. § 1604.4(a) (1986) which provides, in pertinent part:

> The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

Mabry also cites two cases, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) and Stroud v. Delta Airlines, Inc., 544 F.2d 892 (5th Cir.), cert. denied, 434 U.S. 844 (1977), for her argument that her claimed discrimination on the basis of marital status is not covered under Title VII. Stroud is distinguishable from the case at hand because it involved an airline policy forbidding the employment of any

The Title IX regulation on which Mabry relies has two sub-sections. It provides in pertinent part:

(Footnote cont'd.)
married woman as a stewardess. The Fifth Circuit held "that since only women held positions as flight attendants, the no-marriage rule did not discriminate on the basis of sex." Id. at 894. Other courts have been more critical of the no-marriage rule, whether or not men are involved in the policy. See Inda v. United Air Lines, Inc., 565 F.2d 554 (9th Cir. 1977), cert. denied, 435 U.S. 1007 (1978); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

In any event, Mabry's situation here is different. She claims no distinction based on marital status between herself and other women, as in Stroud; she claims no discriminatory impact on women as a group. Rather, she argues that the consideration of her marital, parental and head-of-household status resulted in sex discrimination against her. In Martin Marietta, a woman challenged defendant Martin Marietta's hiring policy differentiated between women with pre-school children and men with pre-school children. The Supreme Court simply stated that "[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man,

> (a) General. A recipient shall not apply any policy or take any employment action:
>
> (1) Concerning the potential marital, parental or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or
>
> (2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

34 C.F.R. § 106.57 (1986). If Mabry rests her argument on subsection 1, it provides no different basis for a claim than does Title VII. As Mabry noted,

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(Footnote cont'd.)
could arguably be a basis for a distinction under § 703(e) [of Title VII which permits employers to hire employees 'on the basis of . . . sex' if sex 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business.' 42 U.S.C. § 2000e-2(e) (1982)]." 400 U.S. at 544. It did not state, as Mabry suggests, that distinctions based on marital status could never be prohibited by Title VII.

Title VII's implementing regulations show that the statute prohibits policies concerning marital, parental or family status that discriminate based on sex. "[A]n employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII. . . ." 29 C.F.R. § 1604.4(a) (1986); see also id. at § 800.149 (1986). Case law further reveals the scope of Title VII. For example, the policy of a religious organization that provided insurance for the "head of the household" was held to violate the statute because the term was interpreted only to mean single persons or married men. EEOC v. Fremont Christian School, 609 F.Supp. 344 (1984), aff'd, 781 F.2d 1362 (9th Cir. 1986). Title VII was also

violated when an airline applied its no-marriage rule to female stewardesses, but not to male stewards. Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

Subsection 1 of the Title IX regulation in question similarly prohibits employment action concerning marital, parental or family status "which treats persons differently on the basis of sex" 34 C.F.R. § 106.57(a)(1) (1986) (emphasis added). We cannot see how subsection 1 creates a claim not cognizable under Title VII. Under Title VII or Title IX, the potential marital or family status distinction only violates the statute if its impact is to discriminate on the basis of sex. Thus, a claim pursuant to subsection 1 that is

actionable under Title IX would also be actionable under Title VII.

Subsection 2, on the other hand, would appear to prohibit employment action based on an individual's status as head of household or principal wage earner, without regard to whether the action treats persons differently on the basis of sex. Id. at § 106.57(a)(2). Arguably, this regulation could create a claim under Title IX that is not cognizable under Title VII. That interpretation of subsection 2, however, by omitting any reference to sex discrimination, would extend beyond the prohibitions of Title IX. "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies

must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." Dixon v. United States, 381 U.S. 68, 74 (1965), quoting Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936).

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976); see also Pacific Gas & Elec. Co. v. United States, 664 F.2d 1133 (9th Cir. 1981). To be valid, a regulation, such as subsection 2 of 34 C.F.R. s 106.57(a), must be "'reasonably related to the purpose of the enabling legislation.'" Guardians Ass'n v. Civil

Serv. Comm'n., 463 U.S. 582, 643 (1983) (Stevens, J., dissenting) (quoting Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973)). "It goes without question, of course, . . . that the regulation cannot impose a standard broader than that imposed by this statute [Title IX]." Cannon v. University of Chicago, 648 F.2d 1104, 1109 n.4 (7th Cir.), cert. denied, 454 U.S. 1128 (1981). Title IX prohibits discrimination on the basis of sex. The regulation at issue cannot, therefore, prohibit conduct which does not result in sex discrimination. Thus, Mabry cannot rely on her interpretation of subsection 2, because that interpretation imposes a standard broader than that imposed by Title IX.

II.

PRECLUSION OF TITLE IX CLAIM

Because she cannot rely on subsection 2 for her Title IX action, Mabry's only claim is that Trinidad's consideration of her marital, parental and head of household status resulted in sex discrimination against her. We are compelled to affirm the district court decision because fundamental preclusion principles bar Mabry's Title IX claim where the district court found no sex discrimination under her Title VII claim.

> Issue preclusion or estoppel prevents the inconsistent determination of the same issues. Estoppel comes into play when an issue involved in a prior decision is the same issue involved in a subsequent action; the issue is actually decided in the first action after a full and fair opportunity for litigation; it was necessary to decide the issue in disposing of the first action; the later litigation is

> between the same parties; and the role of the issue in the second action was forseeable in the first action. 18 Wright and Miller, Federal Practice and Procedure, § 4416 at p.137-38 (West 1981). When these conditions are met, issue preclusion is required. Issue preclusion not only promotes judicial efficiency and repose but also prevents the embarrassment resulting from inconsistent determinations of the same question. Heyman v. Kline, 456 F.2d 123, 130-31 (2d Cir.), cert. denied, 409 U.S. 847 (1972).

Butler v. Pollard, 800 F.2d 223, 224-25 (10th Cir. 1986). In Butler, the plaintiffs brought an action seeking legal and injunctive relief on the ground that a ditch across their land which drained defendants' land constituted a trespass. Trial was bifurcated; the jury found for the defendants on the issue of damages. The district court subsequently determined that it was not bound by the jury's verdict and issued an injunction

in favor of the plaintiffs. We reversed and remanded, finding that the district court erroneously denied preclusive effect to the earlier jury findings on the issue of the existence of a trespass. Similarly, in this case the district court would be bound by its earlier finding of no sex discrimination under Title VII in Mabry's termination, assuming the same legal standard applies to sex discrimination under Titles VII and IX. For the following reasons, we find the standard to be the same. Mabry's Title IX claim is therefore barred.

Both Title VII and Title IX prohibit discrimination on the basis of sex. Title VII explicitly covers employment-related discrimination; Title IX has also been held to cover such

discrimination. North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982). We note that the majority of cases interpreting Title IX have involved the meaning of "federal financial assistance" or "program or activity" under the statute. Few cases to date have considered the substantive standard to be applied under Title IX. We find no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits.[6] See A. Larson & L. Larson, Employment Discrimination, Vol. I § 7.45(b) (1985).

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6 While we note that Title IX is patterned after Title VI, Cannon v. University of Chicago, 441 U.S. 677, 695-96, analogies to Title VI should be made carefully. See North Haven, 456 U.S. at 529. Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard

The EEOC regulations entitled "Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance," 28

(footnote cont.)
it as the most appropriate analogue when defining Title IX's substantive standards, including the question of whether "disparate impact" is sufficient to establish discrimination under Title IX. It is well settled that Title VII does not require proof of explicit or overt discrimination. Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Facially neutral employment practices may still violate Title VII if they operate in fact to disproportionately exclude women from employment. It has been an open question whether such "disparate impact" is prohibited by Title IX. In Cannon v. University of Chicago, 648 F.2d 1104, 1109 (7th Cir.), cert. denied, 454 U.S. 1128 (1981), cert. denied, 460 U.S. 1013 (1983), the Seventh Circuit held that Title IX required proof of discriminatory intent "and that disparate impact alone is not sufficient to establish a violation." We are aware of no Supreme Court or other circuit court decisions which have explicitly decided this issue, although in Guardians' Ass'n v. Civil Serv. Comm'n., 463 U.S. 582 (1983), a

C.F.R. Part 42, Subpart H (1986), direct agencies to "consider Title VII case law and EEOCC Guidelines, 29 C.F.R. Parts 1605-1607, unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice." 28 C.F.R. §42.604 (1986). In addition, there is some similarity between the language used in portions of the two titles. Title IX provides that no

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(footnote cont.)
bare majority of the Supreme Court upheld the validity of Title VI regulations incorporating a disparate impact standard. The Department of Education's regulations implementing Title IX prohibit some facially neutral policies. See, e.g., 34 C.F.R. §§ 106.21(b)(2), 106.21(c)(2)-(3), 106.22, 106.23(b), 106.34(d), 106.37(a)(2), 106.38(a)(2), 106.40(b)(1), 106.52, 106.53(b), 106.57(b)-(c). As we discuss in this opinion, we see no reason to establish different substantive standards for sex discrimination under Title IX and under Title VII.

educational institution shall be required:

> to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community.

20 U.S.C. § 1681(b). This language is similar to Title VII, which provides that no employer or other entity shall be required:

> to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, . . . in comparison with the total number or percentage of persons

> of such race, color, religion, sex, or national origin in any community. . . .

42 U.S.C. § 2000e-2(j).

There is a well-developed body of case law concerning employment-related sex discrimination under Title VII; courts should turn to that case law for guidance if confronted with an employment-related allegation of discrimination under Title IX. We find no persuasive reason to have two separate substantive standards concerning sex discrimination in employment, to both of which recipients of federal financial assistance under Title IX must adhere in their employment practices. A few courts have so held already, either explicitly or implicitly. See O'Connor v. Peru State College, 781 F.2d 632, 642 n.8 (8th Cir. 1986) ("O'Connor recognizes that, to

the degree she relies upon teaching conditions, such as course assignments, her Title IX claim merely duplicates her Title VII claim, and we are bound by her decision thereon in favor of Peru State."); Nagel v. Avon Bd. of Educ., 575 F. Supp. 105, 106 (D.Conn. 1983). See also General Electric Co. v. Gilbert, 429 U.S. 125, 133 (1976). Indeed, Mabry's counsel, in closing argument to the district court in Mabry's Title VII

action, argued that Titles VII and IX share substantive standards.[7]

Accordingly, Mabry's Title IX claim would be barred because the district court ruled in her Title VII action that defendants committed no sex

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7 Mabry's counsel argued as follows:

> Now, I think Your Honor has the discretion to say, Well, this is not a Title IX case, this is a Title VII case, I don't have to follow that law, but it would seem to me that if it's sex discrimination in one context, it's no less sex discrimination in another context simply because it comes down under another Roman numeral in the book, and that if Your Honor would call this the law in a Title IX case persuasively, Your Honor ought to call it the law in a Title VII case and ought now to argue with law that in another context Your Honor would have to enforce against Dr. Sullivan or the people at Trinidad State Junior College.

R. Vol. II at 153.

discrimination in her termination. Mabry had a full opportunity to present her case of employment-related sex discrimination to the court in the course of her Title VII case, including any evidence that defendants' consideration of her marital or parental status resulted in sex discrimination against her or had a disparate impact on women. R. Vol. II at 93-94. There is no new evidence which she could present under Title IX which she was unable to present under Title VII. Indeed, while there has been some question whether Title IX prohibits disparate impact discrimination, as Title VII does, or requires proof of intentional discriminatory conduct, Title IX certainly sweeps no broader than Title VII. Mabry may not have one more

opportunity to show unlawful discrimination, based on the identical facts presented to the court before, but this time under Title IX rather than Title VII.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 83-K-852

PATRICIA MABRY,

Plaintiff,

vs.

THE STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

KANE, J.

This civil action arises from the reduction in force of faculty members at Trinidad State Junior College. Plaintiff was an instructor in the physical education at the college. She alleges that her termination was made on the basis of her sex and thus violates 42 U.S.C. §2000e-2(a)(1). A trial to the

court was held on April 2 and 3, 1985. Numerous documents were admitted into evidence. Because of the volume of the exhibits and the time needed to examine them, I took the case under advisement. I have now examined all the evidence and therefore make these findings of fact and conclusions of law as required by the Rules of Civil Procedure.

STIPULATIONS

Previous rulings of this court make it unnecessary to recite all of the stipulations of the parties. Those which relate to the issue to be decided by this trial are as follows:

1. Thomas Sullivan is the President of Trinidad State Junior College.

2. The acts of defendants about which Ms. Mabry complains were undertaken

by the defendants in their official capacities under Colorado State Law.

3. Ms. Mabry was employed as an instructor and faculty member at Trinidad State Junior College. During the time she was so employed she taught courses in physical education, speech and first aid.

4. In December, 1981, Ms. Mabry received notice of termination due to a "reduction in force."

5. Ms. Mabry was selected for termination through reduction in force rather than either of the two remaining, more senior male physical education instructors.

6. Ms. Mabry has pursued the internal administrative remedies offered by the State Board for Community Colleges and Occupational Education without success. She has also exhausted the

procedures available for administrative investigation, conciliation and relief from the Equal Employment Opportunity Commission.

FINDINGS OF FACT

1. Plaintiff is a highly competent and trained teacher of physical education, health and recreation. She has taught a course in speech competently. In addition to specific teaching assignments, she has demonstrated ability in coaching and officiating. She has pursued continuing professional education and development courses beyond the B.A. and M.A. levels and maintains current memberships in a number of professional organizations. She is regarded as a good teacher. Her termination was not based in any manner upon any consideration

adversely reflecting upon her teaching skills and professional competence.

2. The other two full-time faculty members in the program area of health, physical education and recreation, Marvin Wetzel and James Toupal have more seniority than Ms. Mabry. Each has both B.A. and M.A. degrees. Both are regarded as highly competent teachers. Both belong to various professional associations and both have engaged in some continuing professional development activities beyond the M.A. level, but neither has engaged in such activities to the extent that the plaintiff has.

3. Because of academic training, Mr. Wetzel can and has taught courses in social studies as well as physical education, health and recreation. He coaches as well.

4. Mr. Toupal has baccalaureate level training in accounting and business. He can and has taught courses in these areas as well as physical education, health and recreation. He coaches as well.

5. Neither Mr. Wetzel nor Mr. Toupal had anything to do with the determination that Ms. Mabry should be terminated because of the reduction in force exercise.

6. The defendant, Thomas Sullivan, made the decision to terminate Ms. Mabry. He did so after determining that the competency of the three physical education instructors was relatively equal.

7. In the academic year 1980-81 the college began a reduction in force exercise because it had suffered a

significant decrease in student enrollment during the previous three years. Ms. Mabry was one of those faculty members selected for termination but was reinstated by the State Board following the hearing and review process required by Colorado statutes as implemented by Board policies.

8. After a further decline in enrollment in the Fall of 1981, a further reduction in force exercise was undertaken based upon criteria for student-faculty ratios established by the State Board in its policy number BP 9-40.

9. Based upon the criteria enunciated in BP 9-40, a reduction in the physical education staff from three to two was necessary.

10. Colorado Revised Statute, 1973, 23-10-203 (4) provides:

> In the event that additional reductions beyond those specified in subsection (3) of this section are necessary and competency of faculty members is relatively equal, seniority in the program area affected shall prevail in considering which faculty members shall be reduced. The most recently employed faculty member shall be the first to be reduced and additional reductions shall proceed in that order.

11. Board policy provides that the president of the institution shall determine competency.

> Competency. In determining relative competency for purposes of reduction in force, the president or his designee shall include consideration of the following: proficiency in performing assigned duties, contributions to the institution, assignment flexibility, formal evaluations of the school.

12. President Sullivan testified and I so find that he made the required determination without consideration of the sex of the three physical education

instructors involved; that he would have preferred to keep all three on the faculty; that each was competent and that based on the criteria given the competency of all three was relatively equal. Whereas Ms. Mabry was stronger in continuing to develop professional skills through course work and professional association activities, both Mr. Wetzel and Mr. Toupal were stronger in assignment flexibility. I find no pretext in the determination of relatively equal competency.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter.

2. The plaintiff is a female who was terminated from her employment as an instructor at the Trinidad State Junior

College whilst male instructors were retained.

3. The reason for plaintiff's discharge was a justifiable reduction in force caused by a significant decrease in enrollment at the subject institution.

4. The three faculty members in the physical education program were determined to be of relatively equal competence as the result of the exercise of sound professional judgment by the defendant Sullivan. Illicit consideration of plaintiff's sexual identity did not occur and the reasons stated for her termination were not pretextual. I am not empowered nor do I desire to substitute my judgment for that of the employer. My responsibility is limited to ascertaining whether his judgment violates the law.

O R D E R

IT IS ORDERED that judgment shall enter against the plaintiff and in favor of the defendants. Defendants shall have their costs provided a bill of costs is filed with the Clerk of the Court within ten (10) days of the date of this order.

DATED at Denver, Colorado this 15th day of April, 1985.

/s/ John C. Kane, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 83-K-852

PATRICIA MABRY,

Plaintiff,

vs.

THE STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, et al.,

Defendants.

O R D E R

KANE, J.

This civil rights action was brought alleging violation of 42 U.S.C. §2000e-2(a), 20 U.S.C. §1681, and 42 U.S.C. § 1983. Plaintiff complains that she was terminated from her employment as a physical education professor at Trinidad State Junior College based on her sex and/or her parental or marital status. She seeks damages, reinstatement

with back pay and benefits, attorney fees and costs pursuant to 42 U.S.C. §1988 and 2000e-5(K). This court has jurisdiction under 28 U.S.C. §1331 and 1343, and 42 U.S.C. §2000-5f(3).

Mabry was employed at Trinidad in the physical education department from the academic years 1974-75 through 1981-82. She also taught courses in speech and health.

In December 1981 plaintiff received notice from the college that she was being terminated due to a reduction in force requirement. A lack of work and program changes were the reasons given for Mabry's termination. Mabry complains that during her tenure at the college, she was subjected to sexual-based discrimination because of the nature and quality of the facilities. She also

contends that one of the reasons for her termination was that the two remaining physical education instructors were males.

Mabry has pursued administrative remedies and has received a notice of right to sue from the Equal Employment Opportunity Commission on February 26, 1983. Defendants assert that Mabry was terminated but on justifiable grounds.

The initial determination to terminate Mabry was made by Thomas W. Sullivan, the college president. After receiving notice of her termination, Mabry requested a hearing. Evidently a hearing was conducted by the Campus Hearing Committee. Its finding was adverse to Sullivan's position. Sullivan then requested a hearing before a hearing

officer. That hearing was conducted April 7 to 9, 1982.

The hearing officer upheld Sullivan's decision to terminate Mabry. The State Board for Community Colleges and Occupational Education, defendants herein, reviewed the hearing officer's findings and conclusions and heard oral argument from counsel. The board issued and order August 11, 1982 affirming the hearing officer. Sullivan is also a named defendant.

In this partial summary judgment motion, defendants argue two points: (1) that the board members were acting solely within judicial capacity with respect to their actions concerning Mabry's termination' and (2) Mabry's claims under Title IX and §1983 should be dismissed because the subjects that Mabry taught

were not federally funded, and therefore were not actionable.

Rule 56 F.C.Civ.P. permits the entry of summary judgment on a claim when there is no genuine issue of material fact outstanding. Adickes v. S.H. Kress Co., 398 U.S. 144, 157-59, 26 L.Ed.2d 142 (1970); Luckett v. Bethlehem Steel Corporation, 618 F.2d 1373, 1377, 1383 (10th Cir. 1980). As a matter of law, the movant must show entitlement to summary disposition beyond all reasonable doubt. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

In order to determine the propriety of summary judgment I must construe all pleadings, affidavits and depositions liberally in favor of the party against whom the motion is made. Id. Summary judgment is not a substitute trial by

affidavit. Ando v. Great Western Sugar Company, 475 F.2d 531, 535 (10th Cir. 1973). No margin exists for disposition of factual issues, nor does summary judgment serve as a substitute for trial when there are disputed facts, Commercial Iron & Metal Company v. Bache & Company, Inc., 478 F.2d 39, 41 (10th Cir. 1973). Where different inferences can be drawn from conflicting affidavits, depositions and pleadings, summary judgment should not be granted. United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Romero v. Union Pacific Railroad, 615 F.2d 1303, 1309 (10th Cir. 1980).

IMMUNITY FROM SUIT

Defendants argue that they were acting in a judicial capacity pursuant to their statutory duties and are thus

immune from suit. Mabry argues that the actions defendants took with respect to the termination of Mabry were not judicial; that only the hearing officer's actions could be considered as judicial in nature.

The facts underlying the immunity issue are not disputed. I must determine, as a matter of law, whether defendants were shielded by immunity and, if so, was that privilege vitiated.

There is ample authority in this Circuit to guide me in the resolution of this question of law. In Gilbert v. School District No. 50 Adams County, 485 F.Supp. 505, 508-9 (Colo. 1980), a teacher brought a civil rights action alleging deprivation of due process by school officials and the district. I held in Gilbert, supra, that the school

board may be liable in its official capacity; and that the individual members could be liable if they knew or reasonably should have know their actions would be violative of the constitutional rights of the person affected, or if they acted with malicious intention, or impermissible motivation or with such disregard of constitutional rights that their actions were not in good faith. This qualified immunity doctrine was articulated in Wood v. Strickland, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975), and has been applied in this circuit. For example, in Prebble v. Brodrick, 535 F.2d 605, 612 (10th Cir. 1976), qualified immunity was extended to school officials making decisions on nonrenewal of employment or discharge of instructors. Similarly, in Bertot v.

School District No. 1 Albany, Wyoming, 522 F.2d 1171, 1185 (10th Cir. 1975), qualified immunity under Wood applied. I find and conclude that the Wood test for qualified immunity applies to the facts in this case since defendants' actions were quasi-judicial. In Van Pelt v. State Board of Community Colleges, 195 Colo. 316, 320 (Colo. 1978), the Colorado Supreme Court held that where the action taken by school officials (State Board) involves the exercise of discretion and requires notice and hearing, as in this instance, the action is characterized as quasi-judicial. Id. All that remains for me to consider is whether defendants' protection under the Wood qualified immunity doctrine was vitiated; that essentially, whether the board knew or reasonably should have known that their

actions with regard to Mabry's termination would be violative of her constitutional rights, or whether they acted with improper motivation or with malice.

The record in this case is neither complicated nor voluminous. There is an orderly presentation of the facts and issues. Each of the defendant board members has submitted an affidavit stating that he or she did not have any involvement in the preliminary decision to terminate Mabry; that it was their function as board members to hear Mabry's appeal from the hearing officer's initial decision upholding Mabry's termination; that the board members concurred with the hearing officer's decision based upon a review of briefs that were submitted by both sides and formal oral argument.

Thus, there is no evidence that the board acted improperly with respect to Mabry's termination. Therefore, the qualified immunity of defendants was not vitiated. Their actions were entirely consistent with their statutory duties as members of the board. Summary judgment is granted in favor of defendants on this issue.

FEDERAL FINANCIAL ASSISTANCE

Plaintiff alleges that defendants have violated the Education Amendments of 1972 and its implementing regulations by terminating Mabry on the basis of her parental or marital status and/or her sex. See Education Amendments of 1972, 86 Stat. 373, as amended, 88 Stat. 1862 (1974), 90 Stat. 2234 (1976), 20 U.S.C. § 1681 et seq (Title IX). The Department of Education promulgated regulations which prohibit federally funded education

programs from discriminating on the basis of gender with respect to employment. Any education program or activity that receives Federal financial assistance or benefits from the assistance is subject to the Department's regulations.

Defendants argue that Mabry's claim of sex discrimination under Title IX is not actionable under the facts of this case because the instructional program areas in which Mabry taught (physical education, speech, and health) were not education programs or activities that received federal financial assistance within the meaning of Title IX (20 U.S.C. §§1681 and 1682). Title 20 U.S.C. §1681 in relevant part states the following:

> §1681, Prohibition against sex discrimination - Exceptions
>
> (a) No person in the United States shall, on the basis of sex, be excluded from

> participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

The U.S. Supreme Court has declared that the anti-discrimination provision of §1681 is program-specific in character; that coverage of Title IX is limited to a particular entity and program receiving federal financial assistance. See North Haven Board of Education v. Bell, 456 U.S. 512, 535-39, 102 S.Ct. 1912, 1926-27, 72 L.Ed.2d 299, 317-19 (1982). In North Haven, supra, petitioners disputed the department's authority to regulate any employment practices. The Supreme Court held that employment practices could be regulated if the employees directly participated in federal programs or directly benefited from federal grants, loans, or contracts.

The Court, however, declined to define "program" within the meaning of Title IX.

Mabry's argument rests on the inference that, because physical education classes and other classes she taught were part of the core requirements for all persons receiving degrees in the programs that were benefited by federal financial assistance, coverage under Title IX should be extended to this case.

In Grove City v. Bell, 52 U.S.L.W. 4283 (1984), it was held that Title IX coverage was not foreclosed simply because federal funds are granted to students rather than to the college's education programs; but the Court also held that institution wide coverage of Title IX was not triggered because some students at the college received federal financial assistance through Basic

Education Opportunity Grants. Id. at 4287. Grove City, supra, stands for the proposition that the purpose and effect of the assistance the students received through grants inured to Grove City College's financial aid program; that it was the financial aid program itself that came within the purview of Title IX.

While Grove City was an action that primarily dealt with compliance regulations under Title IX, it is useful here with respect to the statute's reach. Justice White limited the application of Title IX coverage to the financial aid program only, notwithstanding its obvious interrelationship with the entire educational institution, although the opinion did not touch upon that issue.

Defendants have submitted the affidavit of John Tarabino, dean of

administration at Trinidad State Junior College. Tarabino held that position at the time relevant to this complaint. He is the chief financial officer and is responsible for the college's business operation and budget. He states that during the period between January 1, 1981 through August 11, 1982 no unrestricted federal financial assistance was received by the college or through the board; that no federal financial assistance was received by the college or through the board that was specifically designated for, or allocated to, the physical education or language instructional program areas or the Standard Red Cross First Aid and Personal Safety course at Trinidad; that the college did receive federal financial assistance in other education program areas, but that the

assistance received was not used to pay the salaries of instructors employed within the program areas in which Mabry taught.

Mabry's affidavit states in part that she was last employed in the 1981-82 academic school year at Trinidad; that during the year she taught physical education courses, public speaking, and first aid.

For me to find institution wide coverage, I would have to ignore the plain meaning of §§ 1681 and 1681 [sic], its program-specific character, and the judicial determinations articulated in North Haven and Grove City.

THE §1983 CLAIM

Defendants seek summary judgment of dismissal of Mabry's 42 U.S.C. §1983 claim, but advanced an insubstantial

argument to support that desired result. However, I am convinced that Mabry, had she been able to prevail on her Title IX claim against the individual members of the board, would have had full redress to her grievances. That is to say that her remedies under Title IX would have been comprehensive and adequate had the facts been on her side. See Cannon v. University of Chicago, 441 U.S. 677, 703, 704, 709, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). When remedial devices provided in a particular Act are sufficiently comprehensive, they suffice to demonstrate congressional intent to preclude the remedy of suits under §1983. See Middlesex County Authority v. National Sea Clammers Association, 453 U.S. 1, 20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). Therefore, it is

ORDERED that defendants' motion for partial summary judgment for dismissal of plaintiff's 20 U.S.C. §1681 and its implementing regulations, and 42 U.S.C. §1983 claims is granted as to the individual members of the State Board of Community Colleges and Occupational Education.

DATED at Denver, Colorado this 20th day of November, 1984.

/s/JOHN C. KANE, JR.
UNITED STATES
DISTRICT JUDGE

MARCH TERM - April 14, 1987

Before Honorable Monroe G. McKay, Honorable Stephen H. Anderson, Circuit Judges, and Honorable Alan B. Johnson, District Judge*

PATRICIA MABRY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 85-1710
	)	
STATE BOARD OF COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, GORDON DICKINSON, et al.,	)	
	)	
Defendants-Appellees.	)	

Appellant's petition for rehearing is denied.

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

*of the United States District Court for the District of Wyoming, sitting by designation.

ORDERED that judgment is entered for the defendants and against the plaintiff Patricia Mabry; that this complaint and civil action are dismissed and that the defendants shall have their costs upon the filing of a Bill of Costs with the Clerk of this court within 10 days of the entry of this judgment.

Dated at Denver, Colorado, this 16th day of April, 1985.

FOR THE COURT:

JAMES R. MANSPEAKER,
CLERK,

By: /s/ Stephen P. Erlich
Stephen P. Erlich
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83 K 852

PATRICIA MABRY,

Plaintiff,

vs.

THE STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, et al.,

Defendants.

AFFIDAVIT OF PATRICIA MABRY

Patricia Mabry, being duly sworn, deposes and states as follows:

1. I am the plaintiff in the above-referenced matter.

2. I was last employed at Trinidad State Junior College in the 1981-1982 school year. During that year I taught a number of physical education courses, a public speaking course, and a first aid course.

3. In the 1981-1982 school year 3 quarter hours of physical education were required as part of the established common core of basic requirements for all students receiving the A.A. or A.A.S. degrees, the only degrees offered at the college. This 3 quarter hour physical education requirement applied to all of the programs listed in Exhibit A to Appendix H of the defendants' memorandum brief which listed all programs receiving federal aid during times pertinent to this lawsuit.

4. The physical education courses I taught in 1981-1982 satisfied all or part of these degree requirements. In addition, the programs of law enforcement (criminal justice), nursing, and soil conservation, which received federal funds, required either first aid and/or

public speaking for completion of graduation requirements, which courses I taught.

FURTHER AFFIANT SAYETH NOT.

By /s/ Patricia Mabry
Patricia Mabry

Subscribed and sworn to before me this 6th day of June, 1984. My Commission expires: Sept. 24, 1987

(SEAL)

/s/ Dean P. Mabry
Notary Public
106 W. 1st
Address
Trinidad, Colo.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 83-K-852

DEPOSITION OF THOMAS SULLIVAN
January 17, 1984

PATRICIA MABRY,

Plaintiff,

vs.

STATE BOARD OF COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLEY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board of Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,

Defendants.

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Q. Have you ever read that transcript?

A. No, not completely.

Q. Have you ever read it partially?

A. I've read parts of its, yes.

Q. Do you have any reason to believe that any part of it was incorrectly transcribed?

MR. SATRIANA: That he read -- you're asking him the parts that he read, were they correctly transcribed?

MR. HOBBS: No.

MR. SATRIANA: You're asking him a total?

MR. HOBBS: That was not my question. My question was whether or not the witness had any reason to believe that any of the transcript was incorrectly transcribed.

MR. SATRIANA: Object to the form of the question.

A. I didn't read it with that idea in mind. I just really glanced at it and read it, but did not weigh it in that context.

Q. (BY MR. HOBBS) That's another way of saying, is it not, that you have no reason to believe that any of the transcript was incorrectly transcribed?

MR. SATRIANA; Object to the form of the question. He's already asked and answered it.

A. I stand on my answer.

Q. (BY MR. HOBBS) The transcript, as it has been certified by the reporter, and you can assume for purposes of the question that I'm asking you now, that I am representing to you that the transcript is certified by the reporter, states what I'm going to tell you it

states -- and then I'm going to ask you a question about that.

I was questioning you about Miss Mabry's additional summer work as it compared to similar work of Mr. Toupal and Mr. Wetzel and I said, Question. "Well, I asked you who among the three has done the most to keep up and maintain skills and knowledge in the special area of physical education."

Answer. "If you want to call going to the seminars in the summer that, yes. But the other people -- now, let me finish."

The hearing officer said, "Just a moment." Apparently I interrupted you ungraciously.

Your answer was, "Let me finish, would you please?" Answer, "You

analyze some of the courses that she's gone to."

And this is you speaking, according to the transcript.

"You analyze some of the courses that she's gone to. She went to England and took some of these courses. She went to California to take some of these courses and she's gone all over. Now, during the summer, and there is some fringe benefits to that. You have to analyze Mr. Wetzel, who is married and has a family. He made the sacrifice and went for a summer to do that.

Mr. Toupal is married and has three children, or two children. That has to do that. So there are some other factors in there. It doesn't mean that these people aren't keeping abreast of what's going on in the p.e. and their

program area as far as keeping current with it. And yes, she's current, but the other two people are just as current, just as current and just as capable."

Now, to the best of your recollection, is that transcript accurately recorded?

MR. SATRIANA: Larry, before he answers it,can you give me the page numbers and line numbers?

MR. HOBBS: I'm talking about Page 48, and I read from Line 15 through Line 10 on Page 49.

A. (Deponent examines document).

Now, what was your question?

Q. (BY MR. HOBBS) My question is, to the best of your knowledge, is your testimony that you gave on April

8th, 1982, accurately transcribed in the portion of the record that's been called to your attention on Pages 48 and 49?

A. Yes.

Q. At the time you evaluated the relative competencies of Miss Mabry, Mr. Wetzel and Mr. Toupal, preliminary to the RIF in 1981-'82, you were aware, were you not, that Miss Mabry is a single female?

A. Yes, I've always known that.

Q. And you were aware that Mr. Toupal was married and had children?

A. Yes.

Q. You were aware that Mr. Wetzel was married and had children?

A. Yes.

Q. Why did the State Board order the reinstatement of Miss Mabry following the 1980-'81 RIF?

A. I don't know why they did. The hearing was appealed, and they voted to go with the hearing officer's recommendation at that time.

Q. What was the basis for the hearing officer's recommendation?

A. I don't recall for sure.

Q. Didn't it have something to do with the evaluation of relative competency?

A. I'm -- as I recall -- I'm not sure, I don't recall for positive sure. And without having the letter in front of me -- but I think they said that we did not go into relative competency thoroughly enough. Now, that's paraphrased my own way.

TRINIDAD STATE JUNIOR COLLEGE
SPONSORED PROGRAM ACTIVITIES
FISCAL YEARS ENDED JUNE 30, 1981, 1982, AND 1983*

PROGRAM NAME

Work Study (1)
Supplemental Educational Opportunity Grant Initial (1)
Supplemental Educational Opportunity Grant Renewal (1)
Pell Grants (1)
Leep Law Enforcement Education Program (1)
Nursing Scholarship (1)
Health Services (1)
Summer Lunch (1)
Job Corp (3)
Disadvantaged (2)
Mining Tech (2)
Work Incentive Program (3)
Upward Bound (1)
Youth Conservation Camp (4)
Special Services (1)
Title II College Library (1)
Job Placement (2)
Guidance (2)
Fire Service (2)
Homemaking (2)
Adult Basic Education (1)
Veteran Cost of Instruction (1)
Title III Administration (1)
Title III Learning Lab (1)
Title III Curriculum (1)
Solar Adobe (5)
Manpower (3)
Soil Conservation (2)
Mining Equipment (2)
Homemaking (2)
Vocational Energy Education (2)
Supplemental Equipment (2)
Chemistry (6)
Technical Assistance (5)
Cardio Pulmonary Resuscitation (2)

Total

* Exhibit A to Appendix H to Defendants' Motion for Partial Summary Judgment.
(1) Department of Health Education and Welfare
(2) State Board for Community Colleges and Occupational Education
(3) Department of Labor

FY '81	FY '82	FY '83
$105,910.85	$116,048.50	$107,243.70
$36,638.00	$34,357.00	$37,808.00
$10,190.00	$15,333.00	$15,432.00
$296,562.00	$288,168.00	$358,511.00
$164.00	$204.00	
$609.00		
		$7,140.66
		$841.24
$288,405.08	$311,900.76	$130,287.75
$14,026.64	$4,724.49-	$5,721.46
$65,980.63	$36,200.79	$31,404.85
$144.60		
$108,664.37	$104,983.48	$135,170.70
$131.20		
$88,442.92	$90,779.13	$82,784.30
$7.06	$2,088.04	$167.41
$2,061.45	$818.16	
$2,059.99		
$510.00		$170.00
$12,325.28	$10,044.02	$5,467.17
$13,859.12	$20,946.00	$18,432.00
$202.05	$196.70	$336.53
$56,016.32	$31,261.40	
$54,409.56	$6,642.64	
$22,991.46		
$3,764.57	$271.25	
$15.58		
$4,815.17	$5,185.00	
	$29,574.00	
$889.20	$3,000.00	
	$55,000.00	$41,000.00
	$1,500.00	
	$1,095.91	
	$17,117.00	
$4,990.30		
$1,194,786.40	$1,187,439.27	$977,918.77

(4) Department of Interior
(5) Department of Energy
(6) National Science Foundation

(9)

Case No. 87-88

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PATRICIA MABRY,

Petitioner,

v.

STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board for Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DANIEL R. SATRIANA, JR.
ALAN EPSTEIN
of HALL & EVANS
1200 Seventeenth Street, #1700
Denver, Colorado 80202
(303) 628-3300

34 pp

QUESTIONS PRESENTED

Whether the district court's conclusion that Plaintiff's reduction in force was not the result of unlawful sex discrimination under Title VII barred relitigation of this issue under Title IX.

Whether Plaintiff taught courses in programs or activities that received federal financial assistance within the meaning of Title IX.

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INTRODUCTION

The procedural and factual background of this case is fully explained in the Tenth Circuit Court of Appeals opinion, 813 F.2d 311, and will not be repeated at length herein. Generally, Mabry's complaint alleged that her nonrenewal by Defendants violated Title VII, 42 U.S.C. §2000e to §2000e-17 (1982), Title IX, 20 U.S.C. §§1681-1686 (1982), and its implementing regulations, and 42 U.S.C. §1983 (1982). The district court dismissed Mabry's Title IX and §1983 claims on the grounds that the instructional program areas in which she taught were not education programs or activities which received federal financial assistance within the meaning of Title IX, and that the availability of complete remedial devices under Title IX precluded her remedy under 42 U.S.C. §1983. See 597 F.Supp. 1235.

Mabry's Title VII claim was then tried to the court, which found that illicit consideration of her sexual identity did not occur, and further found that the reasons stated for her termination were not pretextual. On appeal, Defendants contended, *inter alia*, that the district court's unappealed finding that Mabry's nonrenewal was not the result of sex discrimination prohibited by Title VII necessarily precluded relitigation of her Title IX claim. Critical to the Tenth Circuit's opinion is its interpretation of 34 C.F.R. §106.57 (1986), a Federal regulation implementing Title IX. Defendants submit that the Tenth Circuit's interpretation of this Federal regulation does not warrant certiorari review by this Court.

REASONS FOR NOT GRANTING THE PETITION

THE TENTH CIRCUIT OPINION DOES NOT INVALIDATE 34 C.F.R. §106.57(a)(2) (1986).

It is important to note that Mabry has mischaracterized the holding of the Tenth Circuit's opinion in her framing of the issue presented for review. Mabry states that the Tenth Circuit opinion invalidates 34 C.F.R. §106.57(a)(2) (1986). However, the Tenth Circuit opinion does not invalidate this regulation; it only interprets the regulation in its Title IX context and in a manner consistent with its purpose which, necessarily, results in preclusion of Mabry's Title IX claim.

34 C.F.R. §106.57 states:

> (a) General. A recipient shall not apply any policy or take any employment action:
>
> > (1) concerning the potential marital, parental or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or
> >
> > (2) which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

The thrust of Mabry's argument in her petition for certiorari is that only gender based discrimination referenced in subsection (1) is the type of discrimination prohibited by Title VII and that subsection (2) discrimination is not covered by Title VII. Under Plaintiff's reasoning, if "head of household" discrimination is not illicit discrimination prohibited by Title VII, then the district court's finding that her nonrenewal was not gender-based does not preclude her Title IX claim. This reasoning is flawed for several reasons.

In the first instance, "head of household" rules which result in a gender-based discriminatory impact are prohibited by Title VII. *See George* v. *Farmers Electric Cooperative, Inc.*, 715 F.2d 175 (5th Cir. 1983); *Wambhiem* v. *J.C. Penny Co.*, 642 F.2d 362 (9th Cir. 1981); *E.E.O.C.* v. *Fremont Christian School*, 609 F.Supp. 344 (N.D. Cal. 1984), *aff'd* 781 F.2d 1362 (9th Cir. 1986). Therefore, the conduct prohibited under subsection (2) would be cognizable under Title VII assuming it results in sex discrimination.

Moreover, Mabry's attack on the Tenth Circuit's opinion actually results in a conclusion which is in accord with the Court's reasoning. The Tenth Circuit's opinion held that 34 C.F.R. §106.57(a)(2) (1986) may not be read in a vacuum, but must be reasonably related to the purposes of Title IX. *See Guardians Association* v. *Civil Service Commission*, 103 S.Ct. 3221, 3254 (1983). Hence, the Tenth Circuit held that subsection (2) cannot be interpreted to prohibit employment based on an individual's status as head of household or principal wage earner without regard to whether the action treats persons differently on the basis of sex. Since Title IX prohibits discrimination on the basis of sex, subsection (2) cannot prohibit conduct which does not result in sex discrimination. 813 F.2d at 315-316.

Mabry asserts in her petition for certiorari that the Tenth Circuit's conclusion in this regard is erroneous. Thus, Mabry at first appears to be arguing that she has stated a cause of action under Title IX by showing that her nonrenewal was based, in part, on the fact that she was single and the other two faculty members were the heads of households, without regard to whether this distinction was the result of sex discrimination. This must necessarily be her position if she is disagreeing with the Court's opinion. However, Mabry actually reaches the indentical conclusion as the Tenth Circuit. After stating that the court's opinion

invalidates subsection (2) by its holding that is cannot prohibit conduct which does not result in sex discrimination, Mabry goes on to argue that Defendants' conduct in this instance *did* result in sex discrimination. She states:

> More importantly, the regulation is manifestly reasonable. One need not reach beyond the first decision of this Court concerning sex discrimination in employment to demonstrate that head of household categorizations generally reflect sex-stereotyping . . .

(Petitioner's petition for writ of certiorari at pages 13-14.) Thus, Mabry argues in a circle. Her premise is that the Tenth Circuit's opinion invalidates subsection (2), yet her conclusion is precisely the same as the Tenth Circuit's conclusion: that subsection (2) must prohibit sex discrimination to be valid under Title IX.

It is submitted by Defendants that the Tenth Circuit properly held that the type of conduct prohibited by subsection (2) must result in sex discrimination to serve as the basis for a cause of action under Title IX since a regulation cannot impose a standard broader than that imposed by the legislation pursuant to which it was implemented. *See Cannon* v. *University of Chicago,* 648 F.2d 1104, 1109 (7th Cir. 1981) *cert. denied,* 102 S.Ct. 981 (1981). If subsection (2) prohibits conduct which results in sex discrimination based upon "head of household" status, then Plaintiff's Title IX claim is barred because the district court found that her nonrenewal was not the result of sex discrimination. *See Butler* v. *Pollard,* 800 F.2d 223 (10th Cir. 1986).

Finally, it should be noted that the only evidence referenced by Mabry which indicated that her nonrenewal was based upon the "head of household" status of her two male colleagues was that Thomas Sullivan, the president of Trinidad State Junior College, stated in his deposition that

Mabry's availability to enroll in out of state courses relating to physical education was affected by the fact that Mabry was single with no children. (See Sullivan deposition, appendix to Petitioner's Petition for Certiorari.) It is otherwise undisputed that Mabry's nonrenewal was the result of a reduction in force proceeding authorized by State Board policy and Colorado statutes, and that the two male colleagues who were retained were considered by Defendants to be equally competent in ability to Mabry. Assuming that this consideration by Sullivan was actionable under subsection (2) of 34 C.F.R. §106.57 (1986), then it would have to be actionable regardless of gender-based discrimination. Clearly, it was irrelevant that Mabry was female and her two male colleagues were male. The necessary implication of Sullivan's deposition testimony is that, as heads of households, nonrenewal would effect a more grievous impact on them and their families than on Mabry, since she was single. Thus, it is her marital status which may have been implicated in the nonrenewal decision. It was entirely irrelevant to this decision that Mabry is a woman. A single man would have suffered the same fate under Sullivan's "head of household" considerations.

It is respectfully submitted by Defendants that the opinion rendered by the Tenth Circuit is eminently reasonable in light of the purpose of Title IX. In fact, careful analysis of Mabry's argument reveals that she agrees with the Court's opinion. Hence, certiorari review is inappropriate. U.S. Sup. Ct. Rule 17, 28 U.S.C.

Plaintiff Did Not Teach Courses in Programs or Activities That Received Federal Financial Assistance, as Contemplated by Title IX.

Because Mabry's Title IX claim is precluded by the district court's finding that she had not shown that Defendants' conduct was actionable under Title VII, this Court

need not address the issue of whether the courses taught by Mabry constituted an education program or activity receiving federal financial assistance. However, assuming Mabry's claim was not barred by the doctrine of collateral estoppel, the district court properly found that the instructional program areas in which Mabry taught were not education programs or activities which received federal financial assistance within the meaning of Title IX.

It has been settled law since 1982 that 20 U.S.C. §§1681 and 1682 are "program-specific." (*North Haven Board of Education* v. *Bell,* 102 S.Ct. 1912, 1926 (1982)) Section 1681 provides, *inter alia*:

> (a) No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity receiving Federal financial assistance.* . . .

(emphasis added) Section 1682, as pertinent here, authorizes Federal departments and agencies which extend Federal financial assistance to education programs or activities:

> to effectuate the provisions of Section 1681 of this Title *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

(emphasis added) The underscored language in these sections was interpreted in *North Haven, supra,* to impose two complementary restrictions on the otherwise broad sweep of Title IX. First, §1681(a) prohibits gender discrimination only in *specific* "education programs or activities receiving Federal financial assistance." Second, the regulatory

authority delegated to the Department of Education by §1682 extends only to the same *specific* federally-assisted education programs and activities. Thus, the *North Haven* court concluded that Title IX and implementing regulations apply "only to programs that receive Federal funds". (*North Haven*, 102 S.Ct. at 1926, n. 27)

In *Grove City College* v. *Bell*, 104 S.Ct. 1211 (1984), the Supreme Court rejected the Third Circuit's conclusion that because Grove City College as a whole "benefited" from the Basic Education Opportunity Grants (BEOGs) awarded to its enrollees, it was itself tantamount to "an education program or activity receiving federal financial assistance." Instead, after finding that BEOGs constituted "Federal financial assistance" within the meaning of Title IX, the Court ruled that only the college's student financial aid program "received" the assistance.

> We conclude that receipt of BEOGs by some of Grove City's students *does not trigger institution-wide coverage under Title IX*. In purpose and effect, *BEOGs represent federal financial assistance to the College's own financial aid program*, and it is that program that may properly be regulated under Title IX.

(*Grove City*, 104 S.Ct. at 1222 (emphasis added))

In reaching this conclusion, the court disposed of any arguments Plaintiff could plausibly advance to support her conclusion that Title IX and its implementing regulations shielded her from the gender-based employment discrimination she has alleged. It is true that several education programs and activities operated by the State Board and TSJC in 1981 and 1982 received federal financial assistance within the meaning of Title IX. (*See*, Tarabino Affidavit, Appendix) On the one hand, students attending the college received BEOGs, supplemental educational opportunity

grants and other federal student aid funds which the *Grove City* Court characterized or in all likelihood would have characterized as "federal financial assistance." On the other hand, certain programs and activities operated by the Board and TSJC received direct, earmarked federal grant-in-aid funding (*id.*) which, Defendants readily concede, constituted "Federal financial assistance" for the purposes of §§1681 and 1682 and their implementing regulations. However, acknowledging that students at the college received federal grants and other financial aid and that certain programs and activities operated by the Board and Trinidad State Junior College received direct, earmarked federal funds does not end the inquiry whether Title IX and its implementing regulations covered Plaintiff's employment as a physical education, speech, and first aid instructor. As the Supreme Court observed in *Grove City*:

> [T]here remains the question . . . of identifying the 'education ~~program~~[s] or activit[ies]' of the College that can *properly be characterized* as 'receiving' federal financial assistance. . . .

(104 S.Ct., at 1220 (emphasis added)) Only if Plaintiff were "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination in employment under . . . " such a program, would either §1681 or its implementing regulations proscribing sex discrimination in employment authorize the relief she has requested under Title IX. *(See North Haven Board of Education* v. *Bell,* 102 S.Ct. at 1926-27 and 1927, n.30; 34 C.F.R. 106.11 and 106.51)

Unlike the airline in *Tudyman* v. *United Airlines,* 608 F. Supp. 739 (C.D. Cal. 1984), TSJC has since 1979 apportioned the college's instructional activities among discrete, clearly delineated "program areas." (*See* Sullivan Affidavit, Appendix) It is undisputed that Plaintiff was employed to

teach in the Physical Education and Languages program areas and to teach a first aid course. (*Id.*) Nor is it disputed that Federal financial assistance was never at any time relevant to this lawsuit designated for, allocated to or otherwise expended in connection with the Physical Education or Languages program areas or the first aid course. (*See* Tarabino, Schubert, and Raak Affidavits, Appendix). Neither the State Board nor TSJC, moreover, received any unrestricted or nonearmarked Federal funds (*id.*) capable of triggering institution-wide Title IX coverage. (*Cf. Arline* v. *School Board of Nassau County*, 772 F.2d 759 (11th Cir. 1985) (receipt of unrestricted federal impact aid by school board triggers system-wide coverage under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794); *Henning* v. *Village of Mayfield Village*, 610 F. Supp. 17 (N.D. Ohio 1985) (receipt of unrestricted federal revenue sharing funds triggers village-wide §504 coverage))

Mabry nevertheless contends that she was employed in a "program or activity receiving Federal financial assistance" because earmarked federal funding for certain programs at the college "overlapped" and "affected" instructional activities in physical education, speech, and first aid. At the heart of her argument are TSJC's "core" graduation requirements: students seeking degrees in certain programs receiving earmarked federal monies were required by the college to complete three quarter hours in physical education courses and/or to take courses in speech or first aid. (*See* Affidavit of Patricia Mabry, Appendix to Petition for Certiorari, p.66) Since students participating in these directly benefitted programs had to take courses in the program areas in which she taught, Plaintiff concludes that her program areas were indirectly benefitted by the earmarked assistance and, like Grove City College's financial aid program, should properly have been characterized by

the District Court as "program[s] . . . receiving Federal financial assistance" for Title IX purposes.

Defendants submit that this nexus between the earmarked federal grants received by the college and Plaintiff's instructional duties is far too attenuated to trigger Title IX coverage of the Physical Education and Languages program areas or her first aid course.

It is true that indirect as well as direct Federal funding may constitute "Federal financial assistance" within the meaning of Title IX. (*See Grove City College* v. *Bell*, 104 S.Ct. at 1216-20) It is also true, however, that not all indirect benefits traceable to direct federal grants extend the coverage of the statute or its implementing regulations to the indirectly benefitted programs. The *Grove City* Court rejected as inconsistent with Title IX's program-specific language the Third Circuit's assumption that the statute and regulations could be applied to an entire institution because the "economic ripple effect" of an earmarked federal grant received by one department indirectly benefitted the school as a whole. (*Id.* at 1221) The Court's reasoning is equally applicable to Plaintiff's claim that Title IX's intrainstitutional coverage should extend to her program areas and course because each indirectly benefitted from the economic ripple effects of direct, earmarked federal grants to other college programs and activities.

Even more tellingly, the *Grove City* Court undertook the task of "identifying the 'educational program or activity' . . . that can properly be characterized as 'receiving' federal assistance . . . ," (*id.* at 1220) by inquiring whether the aid was "in purpose and effect", (*id.* at 1222) Federal financial assistance to that program. Plaintiff must therefore be understood to be arguing that, because of the link supplied by the college's core graduation requirements, earmarked federal grants received by the programs listed in

Exhibit A to Tarabino affidavit were "in purpose and effect" Federal assistance to TSJC's instructional programs in physical education, languages, and first aid. This contention will not withstand even cursory scrutiny. First, any nexus between the earmarked grants received by TSJC and the programs in which Plaintiff was employed to teach is far more tenuous than the connection between student financial aid awards disbursed directly to students and an institution's in-house student financial aid program. As the *Grove City* Court noted, the BEOG grants to students at the school were intended by Congress to "effectively supplement [] the college's own financial aid program [footnote omitted]." (*Id.* at 1217) No such Congressional purpose to supplement or assist Plaintiff's program areas can be inferred from TSJC's unilateral curriculum decision that students in certain other programs, including several receiving earmarked Federal grants, have to take physical education, speech, and/or first aid courses to graduate.

Second, Plaintiff's argument that the student beneficiaries of earmarked Federal grants acted as a conduit extending indirect "Federal financial assistance" and hence Title IX coverage to her program areas cannot be squared with *Grove City's* admonition that there is "no persuasive evidence suggesting that Congress intended the Department's regulatory authority [to] follow federally aided students from classroom to classroom, building to building, or activity to activity." (*Id.* at 1222) Since the Court noted that "student financial aid . . . closely resembles many earmarked federal grants," (*Id.*) it is equally implausible to suppose that Congress intended Title IX coverage to follow earmarked grants' student beneficiaries into each course or activity their college required for graduation.

In short, as the District Court recognized, Title IX's program specific restrictions cannot be conjured away merely by pointing to some kind of connection or link

between earmarked federal financial assistance and otherwise unassisted educational programs or activities. Under *Grove City*, it is the "purpose and effect" of the Federal aid — be it BEOG's or earmarked grants — that identify the specific "program" Congress intended to protect. Plaintiff's assertion that earmarked Federal grants which directly or incidentally benefit a college's students are "in purpose and effect" Federal financial assistance to every instructional program in its core curriculum is inconsistent with both the program-specific language of Title IX and the Court's reasoning and conclusions in *Grove City*.

The District Court's decision in this case is supported by decisions in subsequent Title IX and §504 cases.

In *O'Connor* v. *Peru State College*, 605 F. Supp. 753 (D. Neb. 1985), *aff'd* 781 F.2d 632 (8th Cir. 1986), the Court held that no Title IX coverage existed where the plaintiff taught in the physical education division at Peru State College although the college received Title III grants to support faculty and student research projects which were used to fund a physiology laboratory to which the physical education division had access. (605 F. Supp. at 760-61) In the present case, the nexus between "Federal financial assistance" and the program areas in which Plaintiff taught is even weaker since Mabry had not taught in program areas of TSJC which received "Federal financial assistance" in any form and there has been no showing that the receipt of "Federal financial assistance" by other program areas of the school was for the purpose of benefitting the program areas in which Mabry taught.

Moreover, in those cases in which §504 coverage has been extended to particular programs or activities that were not themselves the direct recipients of federal financial assistance, the courts have emphasized the "direct and tangible" contributions made by the covered program to the

recipient's eligibility for the assistance in question. (*See Frazier* v. *Board of Trustee of Northwest Mississippi Regional Medical Center*, 765 F.2d 1278, 1290 (5th Cir. 1985); *United States* v. *Baylor University Medical Center*, 736 F.2d 1039 (5th Cir. 1984) *cert. denied* 105 S.Ct. 958 (1985)) Plaintiff here does not and cannot contend that the instruction offered by the program areas in which she taught was the *sine qua non* or even a substantial factor in the State Board's or TSJC's receipt of earmarked Federal funds for entirely unrelated programs.

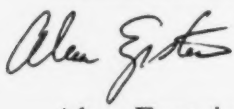
Therefore, since neither the State Board nor TSJC received unrestricted Federal funding or Federal funding which was designated for, allocated to, or otherwise expended in, the program areas in which Mabry taught, the District Court's Order dismissing Mabry's Title IX claim should be affirmed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Mabry's petition for certiorari.

Respectfully submitted,

Daniel R. Satriana, Jr.



Alan Epstein
of HALL & EVANS
1200 Seventeenth Street, #1700
Denver, Colorado 80202
(303) 628-3300

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been placed in the United States Mail, postage prepaid, this 14 day of August, 1987, addressed to:

Larry F. Hobbs, Esq.
5353 West Dartmouth, Suite 501
Denver, CO 80227

Jill Gallet, Esq.
Office of the Attorney General
1525 Sherman, 3rd Floor
Denver, CO 80203

Daniel R. Satriana, Jr.
Alan Epstein

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Case No. 87-88

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

PATRICIA MABRY,

Petitioner,

v.

STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board for Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,

Respondents.

APPENDIX TO
BRIEF OF RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DANIEL R. SATRIANA, JR.
ALAN EPSTEIN
of HALL & EVANS
1200 Seventeenth Street, #1700
Denver, Colorado 80202
(303) 628-3300

TABLE OF CONTENTS

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 83 K 852

PATRICIA MABRY,

Plaintiff,

vs.

THE STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLEY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board of Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,

Defendants.

AFFIDAVIT OF JOHN TARABINO

John Tarabino, being first duly sworn, deposes and states as follows:

1. I am employed as Dean of Administration at Trinidad State Junior College, and have been employed in that position at all times relevant to the above-captioned civil action.

2. As Dean of Administration, I am the chief financial officer of Trinidad State Junior College and have responsibility for the business operation of the College, responsibilities for the budgetary function, and administration of the physical plant operation at the College.

3. During the time period January 1, 1981, through August 11, 1982, no unrestricted financial assistance from the United States Government was received by Trinidad State Junior College.

4. During the time period January 1, 1981, through August 11, 1982, no unrestricted financial assistance from the United States Government was received by Trinidad State Junior College through the State Board for Community Colleges and Occupational Education.

5. During the time period January 1, 1981, through August 11, 1982, no United States Government financial assistance was received by Trinidad State Junior College which was specifically designated for, or allocated to, the Physical Education or Languages instructional program areas or the Standard Red Cross First Aid and Personal Safety course at Trinidad State Junior College, and no United States Government financial assistance was allocated to or otherwise expended in those program areas or course during that period at Trinidad State Junior College.

6. During the time period January 1, 1981 through August 11, 1982, no United States Government financial assistance was received by Trinidad State Junior College through the State Board for Community Colleges and Occupational Education which was specifically designated for, or allocated to, the Physical Education or Languages instructional program areas or the Standard Red Cross First Aid and Personal

Safety course at Trinidad State Junior College, and no United States Government financial assistance was allocated to or otherwise expended in those program areas or course during that period at Trinidad State Junior College.

7. During the Trinidad State Junior College fiscal years ended June 30, 1981, June 30, 1982, and June 30, 1983, Trinidad State Junior College received financial assistance from the United States Government as listed on Exhibit A attached hereto.

8. During the period of January 1, 1981, through August 11, 1982, none of the funds received pursuant to the United States Government financial assistance for Trinidad State Junior College as listed on Exhibit A, attached, was used by Trinidad State Junior College to pay the salaries of instructors employed within the Physical Education or Languages instructional program areas or the Standard Red Cross First Aid and Personal Safety course at Trinidad State Junior College or allocated to or otherwise expended in those program areas or course.

FURTHER AFFIANT SAYETH NOT.

JOHN TARABINO

STATE OF COLORADO)
) ss.
COUNTY OF)

Subscribed and sworn to before me this 12th day of [illegible], 1984.

My Commission expires: _____

Notary Public

Address

EXHIBIT A

TRINIDAD STATE JUNIOR COLLEGE
SPONSORED PROGRAM ACTIVITIES
FISCAL YEARS ENDED JUNE 30, 1981, 1982, AND 1983

PROGRAM NAME	FY '81	FY '82	FY '83
Work Study (1)	$105,910.85	$116,048.50	$107,243.70
Supplemental Educational Opportunity Grant Initial (1)	$36,638.00	$34,357.00	$37,808.00
Supplemental Educational Opportunity Grant Renewal (1)	$10,190.00	$15,333.00	$15,432.00
Pell Grants (1)	$296,562.00	$288,168.00	$358,511.00
Leep Law Enforcement Education Program (1)	$164.00	$204.00	
Nursing Scholarship (1)	$609.00		
Health Services (1)			$7,140.66
Summer Lunch (1)			$841.24
Job Corp (3)	$288,405.08	$311,900.76	$130,287.75
Disadvantaged (2)	$14,026.64	$4,724.49	$5,721.46
Mining Tech (2)	$65,980.63	$36,200.79	$31,404.85
Work Incentive Program (3)	$144.60		
Upward Bound (1)	$108,664.37	$104,983.48	$135,170.70
Youth Conservation Camp (4)	$131.20		
Special Services (1)	$88,442.92	$90,779.13	$82,784.30
Title II College Library (1)	$7.06	$2,088.04	$167.41
Job Placement (2)	$2,061.45	$818.16	
Guidance (2)	$2,059.99		
Fire Service (2)	$510.00		$170.00
Homemaking (2)	$12,325.28	$10,044.02	$5,467.17
Adult Basic Education (1)	$13,859.12	$20,946.00	$18,432.00
Veteran Cost of Instruction (1)	$202.05	$196.70	$316.53
Title III Administration (1)	$56,016.32	$31,261.40	
Title III Learning Lab (1)	$54,409.56	$6,642.64	
Title III Curriculum (1)	$22,991.46		
Solar Adobe (5)	$1,764.57	$271.25	
Manpower (3)	$15.58		
Soil Conservation (2)	$4,815.17	$5,185.00	
Mining Equipment (2)		$29,574.00	
Homemaking (2)	$889.20	$3,000.00	
Vocational Energy Education (2)		$55,000.00	$41,000.00
Supplemental Equipment (2)		$1,500.00	
Chemistry (6)		$1,095.91	
Technical Assistance (5)		$17,117.00	
Cardio Pulmonary Resuscitation (2)	$4,990.30		
Total	$1,194,706.40	$1,187,439.27	$977,918.77

(1) Department of Health Education and Welfare
(2) State Board for Community Colleges and Occupational Education
(3) Department of Labor
(4) Department of Interior
(5) Department of Energy
(6) National Science Foundation

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 83 K 852

PATRICIA MABRY,

Plaintiff,

vs.

THE STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLEY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board of Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,

Defendants.

AFFIDAVIT OF THOMAS SULLIVAN

Thomas Sullivan, being first duly sworn, deposes and states as follows:

1. I am the same Thomas Sullivan who is a defendant in the above-captioned civil action.

2. I am employed in the position of President for Trinidad State Junior College and have been so employed during all times relevant to this civil action.

3. I have personal knowledge of all matters stated herein.

4. In November 1979, I formulated the instructional divisions at Trinidad State Junior College, and pursuant to

Colorado Revised Statutes, Title 23, Article 10, designated program areas within those divisions. These program areas were designated pursuant to C.R.S. 23-10-203 to enable the College to implement reductions in force, should such reductions in force become necessary.

5. One of the divisions is known as the Fine and Liberal Arts Division, and within that division is the Languages program area.

6. Another of the divisions is known as the Physical Education Division or Health, Physical Education and Recreation Division, and within that division is the Physical Education program area.

7. During the academic years 1980-81 and 1981-82 and subsequent, a course known as Standard Red Cross First Aid and Personal Safety was taught at Trinidad State Junior College. This course was not specifically designated as within any of the instructional divisions or program areas within those divisions, as formulated by me in November 1979.

8. During the 1981-82 academic year at Trinidad State Junior College, Plaintiff Patricia Mabry was employed as an instructor within the Physical Education program area. She also taught courses within the Languages program area and taught the Standard Red Cross First Aid and Personal Safety course.

FURTHER AFFIANT SAYETH NOT.

Thomas J. Sullivan

THOMAS SULLIVAN

STATE OF COLORADO)
) ss.
COUNTY OF Las Animas)

Subscribed and sworn to before me this 10th day of April, 1984.

My Commission expires: [illegible].

Notary Public

600 Prospect Street, Trinidad, CO. 81082
Address

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 83 K 852

PATRICIA MABRY,

Plaintiff,

vs.

THE STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLEY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board of Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,

Defendants.

AFFIDAVIT OF RICHARD SCHUBERT

Richard Schubert, being first duly sworn, deposes and states as follows:

1. I am employed in the position of Assistant Director, Fiscal Services for the Division of Community Colleges of the State Board for Community Colleges and Occupational Education for the State of Colorado.

2. I have personal knowledge of all matters stated herein.

3. During the period from January 1, 1981 through August 11, 1982, no unrestricted United States Government financial assistance was received by the Division of Community

Colleges of the State Board for Community Colleges and Occupational Education.

4. During the period from January 1, 1981, through August 11, 1982, no United States Government financial assistance was received by the Division of Community Colleges of the State Board for Community Colleges and Occupational Education which was specifically designated for, or allocated to, the Physical Education or Languages instructional program areas or the Standard Red Cross First Aid and Personal Safety course at Trinidad State Junior College.

FURTHER AFFIANT SAYETH NOT.

RICHARD SCHUBERT

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

Subscribed and sworn to before me this 10th day of April, 1984.

My Commission expires: April 23, 1985.

Notary Public

800 Washington, #606, Denver, Colorado 80203
Address

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 83 K 852

PATRICIA MABRY,

Plaintiff,

vs.

THE STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION, and GORDON DICKINSON, ROSS FORNEY, ANGELO DAURIO, DR. ELINOR GREENBERG, THOMAS GRIMSHAW, RAYMOND GUERRIE, ISAIAH KELLEY, JR., FRED VALDEZ, SR., RAYMOND WILDER, all members of the State Board of Community Colleges and Occupational Education, and THOMAS SULLIVAN, President of Trinidad State Junior College,

Defendants.

AFFIDAVIT OF KENNETH E. RAAK

Kenneth E. Raak, being first duly sworn, deposes and states as follows:

1. I am employed in the position of Assistant Deputy Director, Administrative Services Division for the Administrative Services Division of the State Board for Community Colleges and Occupational Education for the State of Colorado.

2. I have personal knowledge of all matters stated herein.

3. During the time period from January 1, 1981 through August 11, 1982, no unrestricted United States Government financial assistance was received by the Administrative

Services Division of the State Board for Community Colleges and Occupational Education.

4. During the period from January 1, 1981, through August 11, 1982, no United States Government financial assistance was received by the Administrative Services Division of the State Board for Community Colleges and Occupational Education which was specifically designated for, or allocated to, the Physical Education or Languages instructional program areas or the Standard Red Cross First Aid and Personal Safety course at Trinidad State Junior College.

FURTHER AFFIANT SAYETH NOT.

KENNETH E. RAAK

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

Subscribed and sworn to before me this 10th day of April, 1984.

My Commission expires: April 22, 1985.

Notary Public

800 Washington, #608, Denver, Colorado 80203
Address